Supreme Court, U.S.
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No. 92-902

In The

Supreme Court of the United States

October Term, 1992

JOSEPH BERGHMAN AND JOETTA BERGHMAN,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY, et al.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

ALONZO T. STANGA, III
Attorney for Petitioners
STANGA & MUSTIAN, P.L.C.
3117 22nd St., Suite 6
Metairie, Louisiana 70002
Telephone: (504) 831-0666

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ARGUMENT AND REPLY TO OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

When the U.S. Court of Appeals has ignored the language and intent of an Act of Congress in "an important question of federal law which has not been, but should be, settled by this [Supreme] Court" certiorari should be granted.

In its opposition brief, ARCO intimates that *certiorari* is not appropriate here because there has not been demonstrated a conflict in the decisions of the Circuits. It is true that the only other circuit court decision, *Peter v. Hess Oil Virgin Island Corp.*, 903 F.2d 935 (3rd Cir. 1990) followed the *West v. Kerr McGee Corp.*, 765 F.2d 526 (5th Cir. 1985) holding; however, this application has been based upon Rule 10 § .1 (c) and *not* Section (a) (which deals with conflicts between the circuits). Section (c) states, in part, the reasons why *certiorari* may be granted:

> "(c) When a . . . United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, . . .

The fact that only one other circuit decision (*Peter*) decided after the 1984 amendment to LHWCA followed the Fifth Circuit's "borrowed servant" doctrine can hardly be described as "well-established and accepted in all jurisdictions of the United States" as represented by ARCO in its brief. The fact remains that the lower courts have ignored the language, as well as, the intent of the LHWCA and thus far, this Court has not addressed their defiance of the 1984 amendment. It should be noted that in the *Peter* case, the Third Circuit, in following *West v. Kerr McGee, supra,* did not examine the *quid pro quo* intent

of the LHWCA, nor did it examine public policy reasons in adopting the Fifth Circuit's theory of immunity. The fact that the sole appellate decision outside the Fifth Circuit follows the ill-founded "borrowed servant" doctrine is but another reason for granting *certiorari* on this important federal question issue.

The denial of a Writ of Certiorari without reasons does not import an expression of the merits of a case for precedential reasons.

Next, in its opposition brief, ARCO tries to imply that this application should be denied upon the inference that precedential effect should be given to the denial of writ applications in two other "borrowed servant" cases arising in the Fifth Circuit in 1986 and 1987. This position is without merit. It has long been the law of this Court that: "The denial of a Writ of Certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490, 43 S.Ct. 181, 67 L.Ed 361 (1923).

CONCLUSION

The defendant, ARCO, has shown no valid reason why this application should not be granted. To the contrary, as amplified in the original petition, several important reasons illustrate why *certiorari* is appropriate:

1) There has been a clear defiance of a congressional statute;

2) The "borrowed servant" doctrine is unjust, unsound and violative of public policy;

3) The Supreme Court should examine this salient federal issue that has yet to be addressed.

As indicated heretofore, the lower courts are in need of guidance with regard to this important area of federal law.[1] Appellate judges have expressed their doubts as to the soundness and correctness of the "borrowed servant" doctrine, but have felt compelled to follow the law of the circuit. This Honorable Court should address this issue of judicially-created immunity and provide guidance to the courts below. For all of the foregoing reasons, *Certiorari* should be granted herein.

Respectfully submitted,

ALONZO T. STANGA, III
Attorney for Petitioners
STANGA & MUSTIAN, P.L.C.
3117 22nd St., Suite 6
Metairie, Louisiana 70002
Telephone: (504) 831-0666

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[1] It should be noted that there is a writ application pending in this Court in the case entitled *Winston J. Perron v. Bell Maintenance & Fabricators, Inc.*, No. 92-971, which also addresses the "borrowed servant" doctrine.